know, for example in the street, he has only himself to blame if he cannot prove that the import duty has been paid and if he cannot rebut the presumption under section 131(2).

I have to consider the true meaning of that presumption and I have come reluctantly to the conclusion that there is at least a possibility of some ambiguity in the wording of it. The relevant words of the sub-section are :—

". . . . in any prosecution under this section . . . . any uncustomed goods . . . . shall be deemed to be uncustomed . . . . goods . . . . to the knowledge of the defendant unless the contrary be proved by such defendant."

The question is : what is meant by "the contrary"? The affirmative proposition which the defendant has to rebut is :—

"These goods are uncustomed to the knowledge of the defendant."

Now, what must the defendant prove, in order to discharge the onus of proving the contrary of that proposition? Does he have to prove :—

(a) that he does not know that the duty has not been paid; or

(b) that he knows that the duty has been paid?

These are two very different propositions, demanding two very different standards of proof.

Let us take an example : a man approaches "A" in the street and offers to sell him some playing cards. "A" happens to need some playing cards and he likes the look of the ones that are offered to him. There is nothing suspicious about the price which the seller asks. "A" makes no enquiries as to where seller got them from and he buys them without question. "A" is then prosecuted for knowingly being in possession of uncustomed goods. He explains the circumstances to the Court. The Court considers his explanation so probable that a reasonable man ought, under the circumstances of the case, to act upon the supposition that it is true. Can it be said that he has failed to discharge the onus of proof because he has not proved that he knew that the duty had been paid (which, obviously, he cannot do if he cannot trace the seller)?

The learned Deputy Public Prosecutor urged upon me the view that unless a person has reason to believe that the duty has been paid he cannot be said not to know that it has not been paid. This seems to me to stretch the wording of the sub-section beyond its expressed intention : nothing is said about "reason to believe", and it would have been an easy matter to provide for it if it had been intended. If a person can satisfy the Court, in accordance with the standard of proof laid down in the Evidence Ordinance, that he did not know whether the duty had been paid or not, then, surely, he has proved the contrary of the proposition that he knew that the duty had not been paid.

Of the two possible interpretations of section 131(2), which I have designated (a) and (b) above, I prefer (a) as operating less stringently against the subject. This is in accordance with an accepted canon of interpretation.

If the sub-section had been intended to put the purchaser upon inquiry and to make him liable unless he proves that he had reason to believe that the duty had been paid, it could and should have been worded differently. As it stands, it only requires the defendant to satisfy the Court that he did not in fact know that the duty had not been paid, which the respondent succeeded in doing in this case.

In these circumstances I dismiss the appeal.

Appeal dismissed

TAN JOO ENG (m.w.) v. SIANG HENG CO. LTD. & ORS.

[C. A. (Whyatt C.J., Mathew C.J. (F.M.) and Knight J.) October 12, 1956]

[Singapore — Civil Appeal No. 7 of 1956]

Landlord and Tenant —Whether a sub-tenant can be affected by order for possession made without notice to him — Procedure — R.S.C., O. 12 r. 12.

This was an appeal against an order of the High Court allowing the respondents, who claimed to be sub-tenants, to appear and defend, an action for possession, under the provisions of Order 12 r. 12 of the Rules of the Supreme Court. It appeared that the appellant had obtained an order for possession in respect of premises, part of which were in the actual possession of the respondents, without making the respondents parties to the proceedings and without giving them any notice. It was argued that the respondents should have proceeded by way of motion to the Court of Appeal to set aside the judgment. It was also argued that the order allowing the respondents to appear and defend should not have been made, as their affidavits disclosed no merits.

Held: (1) the order giving leave to the respondents to appear and defend the action was rightly made in accordance with the provisions of Order 12 r. 12 of the Rules of the Supreme Court;

(2) it was not necessary for the respondents in their affidavits to deal with the merits of their case. All that they need show was that they were in possession of premises in respect of which an order for judgment had been signed and that they were given no notice of the proceedings before judgment.

Cases referred to :—

(1) *Lewis v. Guntis-Jones* (1949) 119 L.J.R. 769.

(2) *Minet v. Johnson* 6 T.L.R. 417.

(3) *Leicester Permanent Building Society v. Shearly* (1951) 1 Ch. 95.

COURT OF APPEAL.

R. L. Eber (*A. P. Rajah* with him) for the appellant.

H. R. Wilson for the respondents.

The judgment of the Court of Appeal was delivered by :—

Whyatt C.J. : —The question raised by this appeal is whether a sub-tenant can be affected by an order for possession if he has had no notice of the order and no opportunity of being heard in the proceedings in which the order was made.

It has long been settled that in an action for possession the writ should be directed to the persons actually in possession by name, except where there is a large number of sub-tenants in which case it is sufficient if the sub-tenants are given notice so as to enable them to appear in the proceedings if they wish to do so The reason for this practice is to prevent collusion between the plaintiff and the tenant, and it has been said that even if the proceedings have reached the stage of execution, the Court will, if necessary, halt its own process to prevent oppression. The importance of this rule of practice was emphasized recently in the case of *Lewis v. Guntis-Jones*[1] by Lord Justice Denning in the following words :—

"An important principle is involved which is not confined to the Act of 1838, namely, the principle that no occupier is to be affected by an order for possession unless he has had notice of it and an opportunity of being heard. That is a principle of general application which applies in the High Court . . . . and should also apply to all inferior Courts."

The premises in *Lewis v. Guntis-Jones*[1] were within the Rent Restriction Acts, and it seems clear that the principle enunciated by Lord Justice Denning applies to all persons in possession, whether their claim is based on contract or on statute.

Now it is plain, indeed it is common ground, that the applicants obtained an order for possession in this case in respect of premises, part of which were in the actual possession of the respondents, without making the respondents parties to the proceedings and without giving them any notice. The principle laid down in such wide and clear language in *Lewis v. Guntis-Jones*[1] was clearly infringed in the present case, and the only question is how the wrong that was done can be remedied.

This matter was considered and dealt with succinctly by that great Judge, Lord Justice Lindley, in *Minet v. Johnson*[2] :—

"On principle," he said, "a person in actual possession ought to be made a defendant; but where this has not been done, Order XII rule 25 seems to me to point to what is the proper procedure. The moment the person in possession has done as he is there directed, he is treated as a defendant in the action."

Order XII rule 25 reads as follows :—

"Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or a Judge, appear and defend, on filing an affidavit showing that he is in possession of the land, either by himself or by his tenant."

Although it might be said that the wording of this rule appears to contemplate that the application for leave should be made before judgment has been given, it was held in *Minet v. Johnson, supra*, that it is wide enough to include an application made after judgment has been signed and even after execution has issued. The practice in such cases is considered in the *Annual Practice* 1956 at p. 143, where it is stated that if the application is made after judgment, the applicant should apply *ex parte* for leave to issue a summons to set aside the judgment and to appear, with a stay meantime, and should serve the summons on the plaintiff and the defendant in the action. The procedure adopted by the respondents in this case followed precisely the procedure there laid down in the Annual Practice, and since Order XII rule 12 of the Supreme Court Rules corresponds exactly to the English Order XII rule 25, the procedure was, in our view, fully authorised by the Rules and was correct.

This disposes by implication of the argument of the appellants that the respondents should have proceeded by way of motion to the Court of Appeal to set aside the judgment under Order 37, but quite apart from this reason, the respondents' application, in our view, must be dealt with in the original and not the appellate jurisdiction of this Court, since it is an application to be allowed "to appear and defend", and therefore is an application to be allowed to participate in a trial at first instance which should never have been started without the applicant first being given an opportunity of taking part in it.

It remains to consider the further argument of the appellants that the order allowing the respondents to appear and defend should not have been made, as their affidavit disclosed no merits. It is, of course, true that it is invariable practice to require an affidavit to show merits where an application is made to set aside a judgment by default, but the judgment against the respondents in this case was not a default judgment. On the contrary, the complaint of the respondents throughout has been that they had no notice of these proceedings until after judgment had been signed and therefore, it cannot possibly be said that they were in any way, in default. It is not, therefore, necessary that the affidavit should deal with merits. All that it need show is that the applicant is in possession of premises in respect of which an order for judgment has been signed and that he was given no notice of the proceedings before judgment. If that is shown, as it was in the present case, then, in our view, the applicant should as a matter of course be let in to defend.

The question whether he can establish a successful defence, either at Common Law or under the Control of Rent Ordinance, is a matter to be inquired into after he has been given leave to appear and has been added as a defendant in the proceedings. As Wynn-Parry J. said in *Leicester Permanent Building Society v. Shearly*[3], when considering the application of this principle to the facts of that case :—

"It is difficult to imagine how they came to be in possession under that letting unless it was one purporting to have been made by the defendant; but that is not a matter on which, as it seems to me, the Court can at this stage finally pronounce, and an opportunity ought to be given to the occupants to take any point that they may consider open to them with a view to resisting an order for possession against them."

So also in the present case, the respondents should be given an opportunity to resist the appellant's claim for possession by showing, if they can, that they are entitled to the protection of the Control of Rent Ordinance or, indeed, that they are entitled to retain possession on any other ground. The order made by the Court below gives them that opportunity and consequently it should, in our view, be affirmed by this Court.

For these reasons, we are of the opinion that this appeal should be dismissed with costs.

Appeal dismissed.

PUBLIC PROSECUTOR v. FAM KIM HOCK

[A. Cr. J. (Buhagiar J.) October 12, 1956]

[K. L. — Criminal Appeal No. 43 of 1956]

Appeal — Appeal against sentence — Criminal Procedure Code (F.M.S. Cap. 6), s. 294 — Penal Code s. 408.

In this case the respondent was convicted for an offence under section 408 of the Penal Code and was bound over under section 294 of the States Criminal Procedure Code. The Public Prosecutor appealed on the ground that the sentence was inadequate.

Held: (1) the sentence of the Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances;

(2) in this case there was no good reason shown for interfering with the discretion exercised by the learned President and therefore the appeal must be dismissed.

Cases referred to :—

(1) *Liow Chow v. Public Prosecutor* (1939) M.L.J. 170.

(2) *Public Prosecutor v. Lim Guan Hock* (1949) M.L.J. 231.

MAGISTRATE'S CRIMINAL APPEAL.

H. S. Ong (Federal Counsel) for the appellant

R. P. S. Rajasooria for the respondent.

Buhagiar J. : — This is an appeal by the Public Prosecutor against the sentence imposed by the President Sessions Court at Klang on the respondent on conviction for an offence punishable under section 408 of the Penal Code; on conviction the respondent was bound over under section 294 of the Criminal Procedure Code to be of good behaviour for three years in his own recognizance of $5,000 and two sureties for $2,500 to come up for judgment if called upon. The ground of the appeal is that the sentence is inadequate.

At the hearing the learned Deputy Public Prosecutor referred to the facts of the case; he pointed out that the amount involved was $86,000 and the breach of trust had been going on since 1947; under the circumstances, he submitted that this was not a case where the provisions of section 294 of the Criminal Procedure Code should be applied.

It is an established principle that the sentence of the Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances (see *Liow Chow v. Public Prosecutor*[1]). It is clear as Thomson J. pointed out in *Public Prosecutor v. Lim Guan Hock*[2], that the provisions of section 294 of the Criminal Procedure Code do not allow any Court to go to the length of saying that in every case of first offender the antecedents of the convicted person are necessarily such as to make it expedient to bind him over; each individual case must be considered on its own merits.

The offence is by no means of a trivial nature but the points mentioned in the above section are intended by the legislature to indicate the lines on which the discretion of the Court should be exercised. In applying the provisions of section 294 in the present case the learned President took into consideration the fact that the respondent was a first offender, the circumstances under which the offence was committed and that it was quite clear that the parties themselves would welcome a settlement. The last mentioned point would not in most cases be any reason why a convicted person should not suffer the punishment provided by law but in the particular circumstances of this case where the manager's son (who was the person with whom the respondent had to deal mostly and who for all practical purposes was the manager in Port Swettenham) had almost instructed him to commit irregularities is very relevant in considering whether this was a proper case for the application of section 294.

Under the circumstances I do not consider that there is good reason for interfering with the discretion exercised by the learned President and the appeal must be dismissed.

Appeal dismissed.